No. 4055.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GARCIA & MAGGINI CO. (a Corporation),
Plaintiff in Error,

vs.

WASHINGTON DEHYDRATED FOOD CO. (a Corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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INDEX

TABLE OF CASES

OTHER AUTHORITIES

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Following the practice adopted in the brief of plaintiff in error, the parties to the action will herein be designated as they appeared in the court below, as plaintiff and defendant. The judgment was in favor of the plaintiff, from which the defendant appeals.

The opinion of Judge Bourquin, rendered in the District Court (Tr., pp. 27-31), opens with this statement:

> "In this action for breach of contract is no conflict in the evidence but only in the inferences of fact and upon which depend plaintiff's right to the amount of damages."

The evidence consisted largely of correspondence between the parties to the action. As the inferences to be drawn therefrom depend to a large extent upon the sequences of correspondence and events, we tabulate for convenience of reference the following

CHRONOLOGY OF EVIDENCE.

June 13, 1919: Execution of contract between the parties to the action which provided for the shipment, during December, 1919, or January, 1920, at the seller's option, of sixty thousand (60,000) pounds "net choice evaporated apples" (Tr., p. 19). This contract did not designate the apples as Yakima apples or otherwise than as above stated.

January 13, 1920: Letter from plaintiff to defendant notifying the latter of the readiness of plaintiff to ship the car of apples covered by the contract, and requesting shipping instructions. This letter closed with the statement: "Should you elect to inspect these apples at time of loading, rather than accept our grades, we would advise that the applies will be loaded from our Wenatchee factory." (Plaintiff's Ex. No. 1, Tr., p. 33.)

January 16, 1920: Letter from defendant to plaintiff replying to above letter of January 13, requesting sample of apples and inquiring as to possibilities of storage thereof at Wenatchee. (Plaintiff's Ex. No. 2, Tr., p. 34.)

January 17, 1920: Telegram, plaintiff to defendant, again requesting shipping instructions. (Plaintiff's Ex. No. 3, Tr., p. 35.)

January 17, 1920: Telegram from defendant to plaintiff in reply to plaintiff's of even date, referring to letter of same date, and requesting that no shipment be made "until you hear definitely from us." (Plaintiff's Ex. No. 4, Tr., p. 35.)

January 20, 1920: Letter, plaintiff to defendant, advising of order for the forwarding of sample and investigation as to storage facilities. (Plaintiff's Ex. No. 5, Tr., p. 36.)

January 22, 1920: Telegram, plaintiff to defendant, advising as to storage facilities and requesting instructions. (Plaintiff's Ex. No. 6, Tr., pp. 36-37.)

January 23, 1920: Telegram, defendant to plaintiff, declining to accept shipment for the reason that plaintiff was tendering "choice Wenatchee stock whereas you sold us car choice Yakima from your Yakima evaporator." (Plaintiff's Ex. No. 7, Tr., p. 37.)

January 24, 1920: Letter, defendant to plaintiff, reviewing correspondence and concluding: "As explained in our wire we cannot deliver Wenatchee for Yakima and for the above reason cannot accept the car in question." (Plaintiff's Ex. No. 8, Tr., pp. 37-38.)

January 24, 1920: Telegram, plaintiff to defendant, reading: "We understand your wire twenty-third cancels order for car apples. Is this correct? Wire." (Defendant's Ex. A, Tr., p. 55.)

January 24, 1920: Telegram, defendant to plaintiff, reading: "Replying to wire even date, your un-

derstanding correct as tender made by you cancels contract dated June thirteenth nineteen nineteen." (Defendant's Ex. B, Tr., pp. 55-56.)

January 28, 1920: Letter, plaintiff to defendant, asknowledging receipt of defendant's letter of the 24th and stating that the car tendered is extra choice Yakima apples, and concluding: "At any rate, your contract did not call for Yakima apples. Therefore none of the contentions in your correspondence are valid." (Plaintiff's Ex. No. 9, Tr., pp. 39-40.)

February 2, 1920: Letter, defendant to plaintiff, referring to wire of January 24 as an agreement by plaintiff to concellation of contract. (Defendant's Ex. C, Tr., pp. 56-57.)

February 13, 1920: Letter, plaintiff to defendant, reading as follows: "Replying to your letter of the 2nd, will state that we have looked carefully through our correspondence and fail to find anything in the same where we have agreed to the cancellation of your order for a car of apples.

"You made a definite contract for a car of apples which was tendered you within the time limit of the contract and we shall expect you to take delivery of the same. Unless we receive shipping instructions from you on the car in question within a few days we shall sell the same and charge any difference to your account, bring suit to cover." (Plaintiff's Ex. No. 11, Tr., p. 41.)

Between February 13 and March 6, 1920: Segregation in warehouse of apples covered by contract and

notice by plaintiff to defendant of that fact. (Tr., p. 44 [bottom].)

March 6, 1920: Letter from plaintiff to defendant enclosing draft for contract price of apples with warehouse receipt attached and demanding payment. (Defendant's Ex. D, Tr., pp. 57-58.)

February to July, 1920: Unsuccessful efforts of plaintiff to sell the car of apples covered by the contract. (Tr., pp. 41-45.)

July 30, 1920: Sale of car of apples covered by contract to Libby, McNeill & Libby at Chicago at 11¾c per pound. (Tr., pp. 44 and 58.)

September 24, 1920: Collection from purchaser of proceeds of sale of car of apples. (Tr., p. 58, also p. 44.)

September 25 1920: Letter, plaintiff to defendant, notifying defendant of above sale, enclosing invoice and demanding payment of difference between the contract price and amount realized upon resale.. (Plaintiff's Ex. Nos. 12 and 13, Tr., pp. 45-47.)

ISSUES INVOLVED IN APPEAL.

The plaintiff in error states, upon pages 9 and 10 of its brief, that this appeal presents for adjudication four points. We shall discuss these in the order therein set forth.

The first two points presented by the plaintiff in error are correlated, as the answer to both depends upon the inferences to be drawn from the correspondence between the parties. We, therefore, consider them together.

I.

THE CONTRACT BETWEEN THE PARTIES, UPON WHICH SUIT WAS BROUGHT, WAS NOT CANCELED BY ANY CONSENT OR AGREEMENT ON THE PART OF PLAINTIFF, NOR DID THE PLAINTIFF ACCEPT OR ACT UPON ANY ATTEMPTED CANCELLATION OF THE CONTRACT BY DEFENDANT.

The argument by plaintiff in error upon the above referred to issues is based upon the telegrams between the parties of January 23 and 24, 1920. These telegrams must be considered in connection with what had preceded them and with what followed. It is to be noted:

1. The notice from plaintiff to defendant of readiness to ship was dated January 13, 1920. (Plaintiff's Ex. 1, Tr., p. 33.) During the following ten days the inquiries by defendant were as to samples and storage facilities.

2. The refusal of defendant to accept delivery under the contract was dated January 23, 1920, and was based entirely upon the fact that the tender was of "choice Wenatchee stock whereas you sold us Yakima from your Yakima evaporator." (Plaintiff's Ex. No. 7, Tr. p. 37.)

3. The contract did not specify Yakima stock nor in any way refer to the same. (Tr., p. 19.)

4. The letter from defendant to plaintiff of January 24, 1920 (Plaintiff's Ex. No. 8, Tr., p. 38), places

the refusal to accept upon the same unwarranted statement with regard to a contract for Yakima apples.

5. On January 20 plaintiff ordered a sample of the apples proposed to be shipped to be sent to defendant. This sample was doubtless in the possession of defendant when its telegram of January 23 and letter of January 24 were written. (Plaintiff's Ex. No. 5, Tr., p. 36.)

6. The wire from plaintiff to defendant of January 24, 1920 (Defendant's Ex. A, Tr., p. 55), was evidently an inquiry by the plaintiff as to whether the defendant was attempting to cancel its order as covered by the contract. If this wire is to be construed technically, it is to be noted that it does not inquire as to the cancellation of the contract but only as to the cancellation of the defendant's order. This cannot be tortured into a consent by the plaintiff to a cancellation of its acceptance of the order or a release by plaintiff of the defendant from its liability under the contract.

7. The telegraphed reply from defendant to plaintiff, of the same date (Defendant's Ex. B, Tr., pp. 55-56), places the attempted cancellation upon the tender made by the plaintiff ("Tender made by you cancels contract."), which defendant claimed to be of Wenatchee apples in place of Yakima apples, to which defendant claimed to be entitled. This claim was entirely without any foundation in the terms of the contract. Furthermore, the testimony of the president of plaintiff clearly proved that the apples tendered were labeled as Yakima apples which was a general term covering all apples produced in the Central Wash-

ington district, and that there was virtually no difference between those produced at Yakima and Wenatchee. (Tr., pp. 39-40.)

8. If, as claimed by defendant, the wire from plaintiff of January 24 could be construed as a cancellation by plaintiff, defendant did not accept nor act upon such cancellation, but relied entirely upon its claim that plaintiff's *tender* was a cancellation of the contract. Therefore, the argument that cancellation was first suggested by plaintiff, and that defendant relied upon such cancellation, is entirely without foundation in the evidence. Defendant's telegram and letter of January 24 are both conclusive that it had no thought of claiming a cancellation of the contract, except as the result of plaintiff's tender. It is undisputed that the objection to such tender was unfounded and it has never been insisted upon by defendant.

9. The wire from defendant to plaintiff of January 24 was elaborated in the letter of the same date (Plaintiff's Ex. No. 8, Tr., pp. 37-38). In the ordinary course of mail that letter would reach the plaintiff at Yakima, Washington, in approximately three days. On January 28, only four days after the date of the letter mailed by defendant at San Francisco, the plaintiff replied and stated that "none of the contentions in your correspondence are valid." It is, therefore, beyond dispute that if defendant could have been misled by the telegraphic inquiry from plaintiff of January 24, such impression could not have persisted after the receipt by defendant of the letter from plaintiff of January 28, or for more than one week. Furthermore, it is clear that plaintiff promptly re-

pudiated the attempt of defendant to relieve itself of liability under the contract. The same position was reiterated by plaintiff in its letter to defendant of February 13. (Plaintiff's Ex. No. 11, Tr., p. 41.)

As stated in the opinion of Judge Bourquin (Tr., p. 28), this correspondence shows that "defendant rather strategically sought to impress plaintiff with the idea that therein the latter had agreed to rescind; but plaintiff repudiated that version of its language and acts and insisted upon the contract." This opinion further shows that the contention of the defendant upon the trial was for a rescission on its part which was acquiesced in by the plaintiff. In response to that contention, Judge Bourquin says:

> "Rescission by claim thereof by one party acquiesced in by the other, appears from conduct of the latter, (1) affirmative acts inconsistent with continuance of the contract or (2) negative acts of silence or delay calculated to and that do inspire the claimant of rescission with belief of consent, and upon which he acts or fails to act to his prejudice if the fact be otherwise, a variety of estoppel. In principle rescission by acquiescence has no other support or justification. That is not this case and there was no rescission."

Applying the above succinct and forcible statement of the law to the facts disclosed by the record in this case, the only affirmative act on the part of plaintiff was the telegram of inquiry of January 24, 1920, which cannot possibly be construed as a consent, either to the cancellation of the contract, or to the breach thereof by the defendant. There is no basis for a claim of negative acts of silence or delay for the reason

that plaintiff repudiated the attempted strategical construction of its telegram sought to be adopted by the defendant promptly and in the ordinary course of mail.

The question of cancellation of the contract is dependent entirely upon the intent of the parties as disclosed by their acts and correspondence. The principles of law applicable thereto are so elementary that we will not attempt any extensive citation of authorities.

Cancellation of a contract means that the parties to *one* agreement have, by a *second* agreement, given up their rights under the original agreement. The same elements of a contract must be found in the second agreement as in the first. There must be a meeting of the minds through offer and acceptance, as in every other contract. This is forcibly stated by the Supreme Court in

> *Wheeler* v. *New Brunswick & Canada R. R. Co.,* 115 U. S. 29-34, 29 L. Ed. 341.

The Court say (at p. 34):

> "It is to be observed that to annul or set aside this contract fairly made, requires the consent of both parties to it, as it did to make it. There must have been the same meeting of minds, the same agreement to modify or abandon it that was necessary to make it."

Was there any such meeting of minds upon cancellation in the case at bar? The defendant offered to cancel by declining to accept the tendered apples. Did the plaintiff accept such offer, or agree to the defendant's proposal? It is argued on behalf of the defend-

ant that the plaintiff's telegram was in effect such an acceptance. To find an acceptance, it is essential that we find some evidence of an intention on the part of the plaintiff to cancel the contract, but the telegram on the face of it shows that it was a mere inquiry concerning the defendant's state of mind, seeking to ascertain whether the defendant really intended to breach the contract. The words of the telegram are entirely silent with regard to the plaintiff's state of mind, and indicate no intention whatsoever to cancel the contract. It is quite evident that there was no acceptance of any proposal of cancellation made by the defendant so as to make a new and binding agreement. The element of mutual assent, which is so essential to a contract, was entirely lacking. The necessity for such mutual assent is very clearly brought out by the judge in the very case on which the defendant places its chief reliance, viz.:

> *Schwab Safe & Lock Co.* v. *Snow*, 47 Utah 199, 152 Pac. 171.

At page 173 the Court say:

> "The defendant had the right at any time, for any reason or for no reason, to cancel a particular order, and *if the plaintiff joined in the proposal,* for cancellation, that ended the contract."

The defendant in this case did not construe this telegram of the plaintiff as an acceptance of its proposed cancellation, for in its reply, of the same date, it does not state that the plaintiff's telegram contained a cancellation of the contract, but expressly says: "tender made by you cancels the contract." It is quite evident that the parties used the word "cancelled" with

the thought that a single person could cancel a contract; as, for example, the words "tender made by you cancels contract." It is fundamental and elementary in the law of contracts that no rescission of a contract or cancellation, in the sense of rescission, can be made by a single act of any one party, but that it is necessary that two minds meet in order to effect such a cancellation.

It would, indeed, be a new theory in the law of contracts that a proposal or offer might be accepted by an inquiry as to the intent of the proposer.

The case of *Schwab Safe & Lock Co.* v. *Snow,* relied on by defendant, is entirely different from the case at bar. In the Schwab case there is a clear offer and acceptance. A comparison of the offers and acceptances of the two cases will succintly bring out their difference.

Offer of Schwab Case.

"We feel very much grieved in having to request you to cancel the order of W. H. Bishop for No. 160 which you have had since Nov., 1906."

Offer of Case at Bar.

"Referring your letter twentieth and wire twenty-third you are tendering us Choice Wenatchee stock whereas you sold us car Choice Yakima from your Yakima Evaporator Stop We sold Yakima and cannot tender our buyer Wenatchee Therefore cannot accept."

Acceptance of Schwab Case.

"We are *also* grieved that it is necessary to cancel the Bishop No. 160 but it is impossible for us to fill the order in full."

Acceptance of Case at Bar.

"We understand your wire 23rd cancels order for car apples. Is this correct? Wire."

It can readily be seen that the two cases are entirely different when the elements of each are analyzed and placed side by side. In the Schwab case there was a mutual assent. In the case at bar there was an inquiry as to the meaning of an offer. By what possible construction can it be argued that the minds of the parties met? The Schwab case is further distinguished from the case at bar by the fact that in that case the contract was sought to be enforced by the party who first sought its cancellation; while here the complaining party is the one not in default.

The simple question is, therefore, did the plaintiff assent to the abandonment of the contract? The evidence negatives any such assent. The telegram of inquiry of January 24, 1920, does not so indicate, and the attempt of defendant to "strategically impress plaintiff" with that idea was promptly and emphatically repudiated by plaintiff.

The Market Was Unfavorable at the Time of the Breach of the Contract.

The argument of plaintiff in error in attempting to sustain a cancellation of the contract is based partly upon the assertion that the market for dehydrated apples was strong and favorable during the months of January and February, 1920. That statement is made several times in the brief of its counsel. The evidence upon this point is as follows: Ira D. Cardiff, the president of the plaintiff company, testified that he had been in the dried fruit business for a number of years; that his business required him to become familiar with the market for dehydrated or dried

apples in the State of Washington and throughout the country; that he devoted a great deal of time familiarizing himself with markets, as that was one of his chief duties (Tr., p. 32); that in the months of January and February, 1920, there was no such thing as a market in the generally accepted use of that term in the trade, for the reason, among others, that the government was then bringing back evaporated apples and other fruits from Europe and throwing them upon the market; that these conditions prevailed during the months of January to April, inclusive, of 1920; that he made extensive efforts to sell the apples and traveled through the country for that purpose, both quoting prices and soliciting offers, and was not able to make a sale until July, and then at a reduced figure (Tr., pp. 43-44). This evidence is sufficient to warrant and sustain the finding that there was no market for the apples in question at the time of the breach of the contract, and to justify the acceptance of the resale price as the measure of the value of the rejected apples to the seller. As against this evidence defendant produced a witness who was in the dried fruit business at San Francisco at the time of the breach of the contract, who testified to sales made by him in San Francisco in the early part of 1920. The defendant also offered in evidence a trade paper published in San Francisco, giving quotations. It is to be noted that all the prices given by defendant's witness and contained in the quotations were less than those specified in the contract in suit. It is clear, therefore, that upon the defendant's own evidence there was no inducement to the plaintiff to consent to a cancellation or aban-

donment of the contract while upon the same evidence, and particularly as explained by the uncontradicted testimony of the plaintiff's president, which was believed and adopted by the trial court, there was every inducement for that action on the part of the defendant.

The statement on pages 26 and 27 of the brief of plaintiff in error that "the market price for dehydrated apples of the quality and kind contracted for f. o. b. Pacific Coast rail shipping point was between 17½ and 20c per pound"; and the attempt to measure the damages by a computation of an average or mean market price between these figures is misleading. Defendant's witness, Oppenheimer, testified (Tr., p. 60) that the fair market value of choice evaporated apples at San Francisco at the end of January, 1920, was between 17c and 19c, and from one to two cents lower in February. Upon his cross-examination, however, he admitted that there was not an active market for dried apples at any time in 1920 and that the market grew constantly worse from the commencement of that year and as the year advanced; and further that his testimony was based upon sales which his firm had made itself; that they sold about three carloads in January, 1920, and two carloads in February, 1920, and that it was very difficult to make sales of any carload lots in March, 1920. It further appeared that the only definite sales to which he could testify was 1200 boxes (one carload) on January 8, 1920, at 18c per pound, and 76,000 pounds in February, 1920, at 15c per pound. (Tr., pp. 61-62.)

The only mention of the price of 20c was in the

trade paper containing quotations of apples in 50-pound boxes, as follows: Choice at 17¼c; Extra Choice at 18c and 18¼c; Fancy at 20c. It was admitted that "fancy" apples were a better quality than "extra choice" and brought a higher price. The apples here involved were "extra choice." It is also evident and was admitted upon the trial, that the price for apples in 50-pound boxes in less than carload lots was higher than the price for carload lots, and that the price of the former does not control the latter. There was no proof that the quotations read from the trade paper were for carload lots.

The evidence submitted by defendant fails to establish a market price for the apples involved in this suit which can be used as any measure of damage herein, for several reasons.

Delivery under the contract in suit was to be had in Washington. If these particular apples had been sold in San Francisco, freight to that market would have had to be deducted from the selling price in order to establish the net value to the seller. Upon the trial the court called attention to the fact that f. o. b. price Pacific Coast shipping point would not be controlling if the apples were bought in Washington and shipped to California for sale. A statement was made that further evidence would be offered on the question of delivery, but no such evidence was produced. (Tr., p. 65.)

Furthermore, all the evidence of defendant is corroborative of the testimony of plaintiff's president that there was no general market for dried apples at the time of the breach of the contract, and that the

price was constantly declining, and few, if any, sales were being made.

Having elected to segregate the apples, store them for defendant, and subsequently sell them on defendant's account, plaintiff is not bound in any event by the market price at the time of the breach. Inasmuch, however, as plaintiff in error seems to rely to a large extent upon its alleged proof of a favorable market at the time of the breach of the contract, the above reference to the evidence is made; and it is submitted that there is no proof in the record of a favorable market either at the time of the breach or at any time thereafter.

II.

MEASURE OF DAMAGES.

A. Remedies of the Seller Upon Breach of Contract by the Buyer.

Where the buyer has breached the contract, the seller has open to him three different remedies, any one of which he may elect to pursue.

First, he may store or retain the property for the vendee and sue him for the entire purchase price.

Second, he may sell the property and recover the difference between the contract price and the price obtained on such resale.

Third, he may keep the property as his own and recover the difference between the market price at the time and place of delivery and the contract price.

Pabst Brewing Co. v. *E. Clemens Horst Co.*, 229 Fed. 913 (Circuit Court of Appeals, Ninth Circuit, 1916).

At page 916 Judge Rudkin says:

> "Upon the breach of a contract of sale by the purchaser the seller is at liberty to fully perform on his part, and when he has done all that is necessary to effect a delivery of the property, so as to pass title to the purchaser, he may store or retain it for the purchaser, or he may resell it as agent for the purchaser. If he pursues the former course he is entitled to maintain an action for the contract price of the goods. If he pursues the latter his recovery will be the difference between the contract price and the net proceeds of the sale. But it is not obligatory upon him to adopt either of these courses, and if he does not care to do so he is entitled to recover the difference between the contract price and the market price or value of the property at the time and place of delivery fixed by the contract."

Williston on Sales, page 935:

> "Sec. 555. Different remedies allowed by the law in the United States. In a leading New York case the court said: 'The vendor of personal property in a suit against the vendee for not taking and paying for the property has the choice ordinarily of either one of three methods to indemnify himself: (1) He may store or retain the property for the vendee and sue him for the entire purchase price; (2) he may sell the property, acting as agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) he may keep the property as his own and recover the difference between the market price at the time and place of delivery and the contract price.' This statement of law is frequently quoted exactly or substantially, and generally no distinction seems to be taken between cases where title to the goods in question has passed and cases where it has not passed."

These remedies have been recognized and applied by the courts of both Washington and California.

> *Schott* v. *Stone-Fisher etc.,* 35 Wash. 252, 77 Pac. 192 (1904);
> *Lillie* v. *Weyl Zuckerman & Co.,* 45 Cal. App. 607, 188 Pac. 619 (1920).

In the case at bar the plaintiff clearly elected to pursue the second remedy outlined above, notifying defendant to that effect on February 13, 1920. (Plaintiff's Ex. No. 11, Tr., p. 41.)

B. Measure of Damages Where the Plaintiff Has Elected to Sell the Goods and Hold the Buyer for the Difference Between the Resale Price and the Contract Price.

In such a case the true measure of damages is the difference between the contract price and the net proceeds of the sale realized by the seller.

> *Frederick* v. *American Sugar Refining Company,* 281 Fed. 305 (Circuit Court of Appeals, Fourth Circuit, 1922).

The above cited case is on all fours with the case at bar. It was a suit for breach of contract for sale of sugar. Delivery was tendered in August, 1920. The price of sugar having declined, owing to a world-wide deflation of prices, the defendant refused to receive the same. Plaintiff then notified the defendant that unless defendant took the sugar it would be sold on his account. The sugar was sold in December and

January, five months after the breach of contract. Plaintiff demanded the difference between the price of resale and the contract price. Defendant requested a finding that the damage should be based upon the difference between the market price at the time the defendant notified the plaintiff of the refusal to accept the goods and the contract price. The court, dealing at length with the authorities, expressly disapproved the measure of damages contended for by defendant and adopted that relied upon by plaintiff.

The Court say, at page 308:

> "Under this instruction, the defendant would have placed upon the plaintiff the responsibility of the defendant's failure to carry out his contracts, and he had no right, upon his open breach of the contracts, to ask the plaintiff to hazard the responsibility of a further decline in the market. This was a risk the defendant invited by failing to keep his contracts with the plaintiff. The plaintiff had in all respects complied with the contracts, by making the shipments of sugar according to their terms, and was entitled to be paid the amount due. The defendant saw fit to refuse to take what he had bought, and apparently abandoned the purchase, which gave the plaintiff the right to sue at once for the entire breach of the contracts, or to pursue the course that was pursued here, of endeavoring to realize what could be procured from the abandoned purchase, upon due notice to the purchaser, and sue for the residue in case of loss."

Arkansas Short Leaf Lumber Co. v. *Hemler,* 281 Fed. 914 (Circuit Court of Appeals, Eighth Circuit, 1922).

Upon facts largely similar to those in the case last cited, the Court say (p. 917):

> "We do not think the plaintiff could be held to the exact date of the refusal by the defendant to take the logs in estimating his damages; he had the right, using reasonable diligence, to find a purchaser. In the absence of other evidence as to the market price, the price obtained on the resale, immediately or within a reasonable time after the breach of the contract, might be regarded as the market price; the plaintiff, of course, using due diligence and making all reasonable efforts to obtain the best price."

The same measure of damage is again applied in *Central Commercial Co.* v. *Jones-Dusenbury Co.,* 251 Fed. 13 (Circuit Court of Appeals, Seventh Circuit, 1918).

The Supreme Court of Washington has announced the same rule in

> *Carlisle Packing Co.* v. *Deming,* 62 Wash. 455, 114 Pac. 172 (1911).

In that case the defendant refused to accept salmon in accordance with the terms of its contract. Plaintiff tendered the goods in February, which tender was refused. Thereupon plaintiff notified defendant that the fish would be offered for sale and defendant held for the difference. The market was slow and plaintiff did not succeed in selling the goods until late that year, nine months after the breach of contract. The court allowed as damages the difference between the contract price and the resale price. At page 460 of the official report and page 173 of 114 Pacific Reporter, the Court say:

> "The respondent had sold its own goods for the best prices obtainable and its measure of damage

was the difference between the selling price and contract price provided the contract and the breach of it were established."

To the same effect is

Carver-Shadbolt Co. v. *Cline,* 69 Wash. 586, 125 Pac. 944 (1912).

The measure of damages to be allowed upon breach of contract is not a matter of remedy controlled by the law of the forum, but is a substantive right of the parties to be determined by the law of the place of performance—in this case by the law of the State of Washington. This has been definitely determined as to allowance of interest upon contracts by the Supreme Court in the case of

Coghlan v. *South Carolina Ry. Co.,* 142 U. S. 101, 35 L. Ed. 951.

The same rule has been applied to the determination of the measure of damages in

Berlet v. *Lehigh Valley Silk Mills,* 287 Fed. 769 (Circuit Court of Appeals, Third Circuit, 1923).

In that case the contract was made in New Jersey to be performed in Pennsylvania. One of the contracting parties asserted a lien on the goods. The other party having become insolvent, the question arose as to what law should control the validity and effect of the lien. Upon that question the Court say (p. 771):

"It is a general and well settled principle of law that contracts made at one place to be performed at another are governed by the law of the place of performance."

In *Sandham* v. *Grounds,* 94 Fed. 83 (Circuit Court of Appeals, Third Circuit, 1899), at page 83, the Court say:

> "We cannot doubt that the damages in this case must be determined by the laws of the State of Pennsylvania where the contract was to be performed and where the assets of Smith's estate are properly distributable."

12 C. J. 486:

> "Questions as to the elements and amount of damages recoverable for a breach of contract or a violation of a duty growing out of a contract pertain to the right, and not to the remedy, and are governed by the lex loci contractus."

But even if the damages should be computed under the law of California, as contended for by plaintiff in error, no different result will follow. In that state the law upon the subject has been codified in the following sections of the Civil Code:

> "Sec. 3311. Breach of Agreement to buy personal property. The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be:
>
> 1. If the property has been resold, pursuant to section three thousand and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale; or,
>
> 2. If the property has not been resold in the manner prescribed by section three thousand and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the

property to market, over those which would have been incurred for the carriage thereof, if the buyer had acepted it."

"Sec. 3353. Value, how estimated in favor of seller. In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale."

Section 3049, referred to in Section 3311, is as follows:

"Sec. 3049. Lien of seller of personal property, One who sells personal property has a special lien thereon, dependent on possession, for its price, if it is in his possession when the price becomes payable, and may enforce his lien in like manner as if the property was pledged to him for the price."

Under these sections, it has been held that the seller may recover the difference between the contract price and the resale price even though the sale is a private one.

Lillie v. *Weyl Zuckerman Co.,* 45 Cal. App. 607, 188 Pac 619 (1920), was an action on a contract for refusal to take potatoes at the contract price of $2.40 per unit. Delivery was tendered in July, according to the terms of the contract. Defendant refused to accept the tender. Later the plaintiff sold the potatoes at $1.40 per unit and sued for the difference. No notice of resale was given to the defendant. The Court held that the plaintiff could recover the differ-

ence between the contract price and the price obtained on resale. At page 610, it is said:

> "Under Sections 3311 and 3353 of the Civil Code, the measure of damages, where title is not vested in the purchaser and the property not resold in the manner provided by Section 3049—which is the case here—is the difference between that which the purchaser agreed to pay and the value of the property to the seller on the resale thereof, which value is deemed to be the price obtainable therefor in the nearest market to the place at which it should have been accepted by the buyer."

In *King* v. *Globe Grain & Milling Co.,* 58 Cal. App. 105, 208 Pac. 166 (1922), at page 169, the Court say:

> "Ordinarily where, as in the instant case, the seller has made a resale, the detriment caused by the breach of the buyer's agreement to accept and pay for the property, the title to which is not vested in him, is deemed to be the excess, if any, of the amount due from the buyer under the contract over the net proceeds of such resale."

There is no such statutory provision in Washington and the law of that state does not require the sale to be made at public auction. The section of the Washington statute, quoted on page 42 of the brief of plaintiff in error, refers to "the sale of property under *execution, order of sale or decree,*" and has no application to the law of sales or measure of damage.

Under the California statutory provisions it is thoroughly well established that if property has been resold in the manner prescribed for a pledgee's sale, as provided in Section 3049 of the Civil Code, such

resale is a *conclusive* measure of the damage, but if a resale has been made without complying with the provisions of the sections above referred to, the price received upon resale is evidence (although not conclusive) of the value to the seller and, therefore, of the measure of damage.

In *Hewes* v. *Germain Fruit Co.,* 106 Cal. 441 (1895), the Court say, at page 446:

> "The sale of such property in the manner in which pledged property is required to be sold is not confined, however, to property the title to which has passed to the buyer; but, if the property is sold in that manner where the title has not passed, such sale is conclusive as to the value of the property, while, if it is not so sold, the plaintiff must prove the value of the property to him; and this value was found by the court upon sufficient evidence."

The same rule has been adopted by the Supreme Court of California in cases where title has passed.

In *Phillips* v. *Stark,* 186 Cal. 369 (1921), at 374, the Court say:

> "But where, as here, although the title has passed, the vendor still retains the property, the value of the property must be offset against the purchase price. The vendor may not have both the full purchase price and the property. It is quite immaterial in the present case upon what theory this is worked out, whether upon that suggested by us, that by repudiating the contract and thrusting the property back on the plaintiff, the defendants put him in the situation of a vendor under an executory contract, in which case the measure of damages is the difference between the contract price and the market value of the prop-

erty (Civ. Code, Secs. 3311, 3353), or upon that suggested by *Bennett* v. *Potter,* that the vendee is responsible for the full purchase price under Section 3310 of the Civil Code, but the vendor is liable to the vendee in damages for a conversion. The result is the same in either case, since the measure of damages for a conversion is the market value of the property. (Civ. Code, Sec. 3337.)

"(4) The other thing that we would add is that the complaint is defective in not alleging the market value of the property. It does allege the amount for which it sold on the resale, and this was evidence of the market value (*Meyer* v. *McAllister,* 24 Cal. App. 16 [140 Pac. 42]), but the allegation was only one of an evidentiary and not of an ultimate fact. No point was made of this defect, and it could easily have been cured if point had been made of it. The judgment against the plaintiff should not, therefore, be sustained by reason of it."

Under the California law, in the event of sale without compliance with Section 1049 of the Civil Code, the value to the seller must be determined from a preponderance of evidence in the case, of which the resale price is the most persuasive, and, in mose cases, the conclusive, factor. In the case at bar, the evidence is positive on the part of plaintiff that the resale was made as soon as reasonably practical, by a competent and prudent salesman in the exercise of diligence and inspired by honesty of purpose and fair consideration for the defendant as well as for the plaintiff, as stated in Finding No. 5 of the District Court (Tr., p. 24) and in the opinion of Judge Bourquin (Tr., p. 30). The only evidence of any other value are the statements of the one witness produced by defendant as to values based on certain sales made by his firm in San

Francisco, and market quotations from a trade paper published at the same place, which latter were made up from hearsay evidence of asking prices, without knowledge of actual sales. (Cross-examination of witness Bartholime, Tr., pp. 65, 66.)

The diligence and good faith of the plaintiff are beyond question for the reason that its president spent his time from February to July in attempting to make a sale of these apples, during all of which time the plaintiff was in possession of three other cars of similar apples belonging to itself and which it was also endeavoring to sell. The sale of its own apples was not effected until about a year later, and then at less than half the price which was realized upon the sale of the defendant's apples. (Tr., pp. 49-50.) (Judge Bourquin's opinion, Tr., p. 29.) In other words, as stated by the president of the plaintiff, "we made constant and vigorous efforts to sell them" (Tr., p. 50), but in spite of such efforts plaintiff could not realize upon the defendant's apples until July, 1920, and then gave the defendant the benefit of the first sale, holding its own goods, which were in all respects similar, for an additional year and then selling them at less than half the price for which defendant received credit.

C—Binding Effect of Resale Price.

On page 33 of its brief, plaintiff in error states:

> "In order to bind the defendant by the amount realized upon the resale it was necessary:
>
> (1) That notice of the resale be given to the defendant;
>
> (2) That the resale be made within a reasonable time, and

(3) That the resale be made in the market of delivery and performance, or in the nearest available market."

The District Court found that the plaintiff had complied with all of the above requirements, and it is submitted that that finding is sustained by the evidence. By notice of resale, specified by plaintiff in error in its requirement No. 1, the most that is required under any view of the law is a notice of *intention to resell.* The reasonableness of the time within which it is required that such resale be made is dependent on the circumstances of the case. As shown by the case cited in Judge Bourquin's opinion, it has been held that a delay of two years was not unreasonable under certain circumstances. The evidence of the president of the plaintiff shows that the efforts to resell were energetic and continuous and made in the usual method prevalent in the trade, first by offering the goods through brokers, secondly by soliciting offers from brokers, and finally by personal travel by the president of the plaintiff corporation throughout the country in an effort to resell, and that the earliest sale that could be made under all these circumstances was in July 1920, and that Chicago was the nearest and only available market at that time. The evidence of both plaintiff and defendant shows that the market price for these apples was constantly declining during the first half of the year 1920, the reason therefor being clearly stated by the president of the plaintiff corporation. The defendant's witness, who testified to sales in San Francisco, stated that on January 8, 1920, he sold 1200 boxes of extra choice

evaporated applies at 18c, and on February 17, 1920, he sold 76,000 pounds at 15½c (Tr., p. 62), and the quotations from the trade journal show the constant decline during the time in question.

1. Notice of Time and Place of Resale to be Distinguished From Notice of Intention to Resell.

It may readily be seen, upon analysis, that notice of resale may cover two entirely different stiuations between which it is necessary to distinguish, otherwise an erroneous application of authorities may result.

Confusion appears in the brief of plaintiff in error (and in some decisions) by failure to distinguish between the necessity of notice to the defaulting purchaser of *an intention to resell,* and notice of the *time and place of such resale.* By the weight of authority (with contrary rule in some jurisdictions) it is held that after a positive breach by the purchaser, no notice by the seller of even an intention to resell is necessary.

Williston on Sales, Sec. 548:

> "Notice that resale is to be made.—In some cases it has been held that in order to bind the buyer by a resale, the seller must have given notice of his intention to make a resale. *But by the weight of authority there is no such absolute requirement.*"

The Uniform Sales Act, which has been adopted in many states, section 60, subsection 3, provides:

> "It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer."

However, it is not necessary to discuss this question, since in the case at bar the seller did notify the buyer of his intention to resell the goods.

While there is some conflict of authority upon the above proposition, there is practically no conflict upon the further rule that if a notice of intention to resell has been given to the purchaser, no further notice of the time and place of resale is necessary.

Williston on Sales, Sec. 549:

> "Notice of time and place of sale.—Though as appears from the preceding section, some courts have held the seller bound to give notice of his intention to resell the goods, it seems uniformly agreed that there is no legal requirement of notice of the time and place where the sale will be held."

In the case of

> *Frederick* v. *American Sugar Refining Co.*, 281 Fed. 305 (supra),

no notice of time and place of sale was given, yet the Circuit Court of Appeals for the Fourth Circuit allowed as damages the difference between the contract price and the resale price.

So also in

> *Arkansas Short Leaf Lumber Co.* v. *Hemler*, 281 Fed. 914 (supra);
> *Carlisle Packing Co.* v. *Deming*, 62 Wash. 455, 114 Pac. 172 (1921) (supra).

In the last case the plaintiff notified the defendant of its intention to sell the goods but did not later advise defendant of the time and place of sale. Nevertheless

the court allowed as a measure of damages the difference between the contract price and the price of resale.

> *Katzenbach* v. *Breslauer,* 51 Cal. App. 756, 197 Pac. 967 (1921).

This was an action against defendant for breach of contract for failure to purchase a carload of soda. Defendant refused to take the goods on arrival. Plaintiff sold the goods at San Francisco. The court allowed as damages the difference between the contract price and sale price. The court held that notice of time and place of sale was not necessary.

In the case at bar a definite notice was given by plaintiff to defendant of its intention to resell the apples. This notice was dated February 13, 1920 (Plaintiff's Ex. No. 11, Tr., p. 41). As stated by the District Judge, "having notified defendant it would resell, plaintiff, in a hunt for a market and a purchaser, was under no obligation to also give notice of the time and place. (Mechem, Sales, sec. 1637.)" (Tr., p. 30.)

Section 1637 of Mechem on Sales, referred to in the above quotation from Judge Bourquin's opinion, is as follows:

> "Notice of Time and Place of Resale.—But whatever difference of opinion there may be respecting the necessity for notice of the purpose to resell, it seems quite unanimously agreed that notice of the time and place of the sale is not required, though, when practicable, the giving of such a notice would be safe and proper."

2. Resale Must Be Made Within Reasonable Time.

The sale in the case at bar was consummated within a reasonable time. The evidence proves that at the time defendant breached the contract the country at large was suffering a great deflation of prices and that markets were entirely upset. This is referred to by Judge Bourquin as "historical deflation." (Tr., p. 29.) It appears from the evidence of both parties that there was no market immediately after the breach of the contract; and plaintiff sold the defendant's apples before it consummated a single sale of its own.

It has been held that where the market is depressed five months is not an unreasonable time.

Frederick v. *American Sugar Refining Co.,* 281 Fed. 305 (supra).

Nine months has been held not an unreasonable time in the case of *Carlisle Packing Co.* v. *Deming,* 62 Wash. 455, 114 Pac. 172 (supra) (1921).

In *Peck* v. *Co.,* 131 La. 177, 59 So. 113 (La.), referred to by Judge Bourquin's opinion, a delay of two years was held not unreasonable.

3. The Goods Must Be Sold at the Market of the Place of Delivery or the Nearest Available Market.

Discussion of this question is unnecessary, as the evidence shows conclusively that there was no market at the place of delivery, and that the plaintiff used great diligence and much effort in attempting to sell the goods before an actual sale was made.

The following cases hold that if no market exists the plaintiff may sell the goods to any purchaser at any location.

Frederick v. *Am. Sugar Refining Co.,* 281 Fed. 305 (supra);

Lillie v. *Weyl Zuckerman Co.,* 45 Cal. App. 607, 188 Pac. 619 (1920);

Carlisle Packing Co. v. *Deming,* 62 Wash. 455, 114 Pac. 172 (1921).

Williston on Sales, p. 969:

> "If there is no market value from which the goods can be sold, it is impossible to lay down a narrower principle than that the plaintiff is entitled to the full amount of the damage which they have really sustained by a breach of the contract."

24 R. C. L. Sec. 390, at page 121:

> "Where the character of the commodity or article sold is such that there is no general market for it at or near the place of delivery, or where there is no general purchaser for the same except the buyer, it is necessary that some other criterion be taken than the difference between the agreed price and the general market value, and in such a case it has been held that the seller is entitled to recover the difference between the agreed price and the price at which he is compelled to resell."

SUMMARY.

In summarizing as to the measure of damages in this case, we repeat that where the plaintiff has elected to sell the goods on the buyer's behalf, the damage is the difference between the contract price and the re-

sale price where such resale has been fairly and honestly made. The rule is succinctly stated in

> *Habeler* v. *Rogers,* 131 Fed. 43 (Circuit Court of Appeals, Second Circuit, 1904), at page 45:
>
> "The law applicable to actions for a breach of contract of sale of goods is so familiar that it almost seems superfluous to repeat the settled rules which obtain. Upon a breach by the vendee the vendor is at liberty to fully perform upon his own part, and, when he has done all that is necessary to effect a delivery of the goods, so as to pass the title to the vendee, he may store or retain them for the vendee, or give the vendee notice and resell them. If he pursues the former course, he is entitled to maintain an action for the contract price of the goods. If he pursues the latter, his recovery will be the difference between that price and the net proceeds of the resale. But it is not obligatory upon him to adopt either of these courses, and, if he does not care to do so, he is entitled to recover the difference between the contract price and the market price or value at the time and place of delivery fixed by the contract. Where a vendee explicitly refuses to perform his part of an executory contract before the time for performance by the vendor has arrived, no tender of performance on the part of the latter is necessary to entitle him to recover damages for the breach."

The plaintiff in error has failed to appreciate the importance of the fact that the seller may so elect his remedies and consequently has failed to distinguish between cases in which the seller has so elected to sell goods in behalf of the buyer and those cases where no such sale has been made. Many of the cases cited in its brief are of the latter class.

The authorities upon the right of resale in cases of this character, the method of making the same and the effect of such sale, are reviewed in a note found in 42 Lawyers' Reports Anno., (N. S.) at page 683, referred to in Judge Bourquin's opinion.

D—No Anticipatory Breach in the Case at Bar.

In the discussion by plaintiff in error of the measure of damages it is claimed that "the contract was kept alive for the benefit of both parties until the 31st day of January, 1920, the date agreed upon for delivery"; and it is argued that there was an *anticipatory* breach of an executory contract of sale on January 23, 1920. It is submitted that this is a misconception of the facts and the law here involved, and that the question of anticipatory breach of an executory contract does not arise in the case at bar. The contract upon which suit was brought, provided for shipment in December of 1919, or January, 1920, at the seller's option. The seller exercised this option on January 13, 1920, by notifying the defendant of its readiness to ship the apples and requesting shipping instructions. This was an offer by plaintiff of full performance of the contract at the time therein designated. The complete breach of the contract by defendant therefore occurred on January 23, 1920, after plaintiff's offer to fully perform. This was in no sense an anticipatory breach but was a refusal by the defendant to carry out the terms of its contract upon offer of the plaintiff to fully perform. It was a final refusal and breach of the contract on January 23rd, to the same extent as if the offer or the refusal or both had occurred on January

31, 1920. For the reasons above stated, we make no further comment upon the discussion contained in the brief of plaintiff in error as to the rules of law applying to an anticipatory breach of an executory contract of sale.

III.

THE PLAINTIFF OFFERED TO DELIVER TO DEFENDANT AND SUBSEQUENTLY SOLD THE GRADE AND QUALITY OF APPLES CONTRACTED FOR BY DEFENDANT.

The fourth point discussed by plaintiff in error in its brief, pages 48 to 50, seems to be based upon the lack of proof that the contract could not have been filled with "choice" evaporated apples at 18½c instead of "extra choice" at 19c. It is claimed that the offer of plaintiff to fulfill the contract did not comply with its terms. To this argument there are several answers:

1. The tender from plaintiff to defendant, on January 13, 1920 (Plaintiff's Ex. No. 1, Tr., p. 33), was of "the car of dried apples ordered from us." There was no designation of "choice" or "extra choice" in this tender. The letter closed, however, with a request to the defendant to inspect the apples at time of loading if the defendant did not wish to "accept our grades", thus implying that the apples might be any of the grades specified in the contract.

The breach of the contract by the defendant on January 23, 1920 (Plaintiff's Ex. No. 7, Tr., p. 37),

occurred three days after the sample of the apples was ordered forwarded. (Plaintiff's Ex. No. 5, Tr., p. 36). Its only objection to the sample so received was that plaintiff was tendering Wenatchee instead of Yakima stock. As heretofore stated the contract did not mention Yakima stock.

The breach of the contract by defendant in refusing to accept delivery of the car of apples tendered relieved the plaintiff, at its option, from any other tender under the contract of further performance on its part. Upon an unconditional breach by one party to a contract, the obligations as to performance on the part of the other cease.

> *Roehm* v. *Horst,* 178 U. S. 1, 44 L. Ed. 953; California Civil Code, Sec. 1440.

2. As above stated, the objection by defendant to the tender, and the resulting breach of the contract, was based entirely upon the alleged tender of Wenatchee stock in place of Yakima stock. This is shown both by the telegram of January 23rd (Plaintiff's Ex. No. 7) and the letter of January 24th (Plaintiff's Ex. No. 8, Tr., pp. 37-38). Defendant's objection upon this one ground was a waiver of any other objection to the tender which it might have then made. Having rested its rejection upon that single ground, it could not later avail itself of any other reason for its action. The law upon this point is clearly stated by the Supreme Court in the case of *The Ohio & Mississippi Railway Company* v. *McCarthy,* 6 Otto (96 U. S.) 258-268, 24 L. Ed. 693-698.

In that case, a railroad company excused its failure to ship certain cattle upon the ground that it did not

have sufficient cars to make shipment. When suit was brought, it attempted to defend upon the further ground that the shipment was requested upon Sunday which, under the law in West Virginia, where shipment was to be made, was illegal. After holding that the latter point was an afterthought, suggested by the pressure and exigencies of the case, the Supreme Court say (P. 268 Official Edition, p. 696 L. Ed.):

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." (Citing cases.)

The above pronouncement of the Supreme Court is quoted with approval in the decision by Judge Ross in the Circuit Court of Appeals of this Circuit, and the citation of many cases to the same effect is added in the case of *Polson Logging Co.* v. *Neumeyer*, 229 Fed. 705-708 (Ninth Circuit).

In that case it is held that the purchaser had valid objections to the acceptance of certain steel bars for the reason that the length and weight did not correspond with the terms of the contract, and if refusal had been seasonably made upon those grounds, the purchaser would have been justified in such refusal, "but," say the Court, "the case shows that the purchaser refused to receive the steel so shipped solely upon the grounds that the seller's solicitor was guilty of fraud in procuring the order and that the defendant's employee was without authority to give it, and

therefore that there was no sale or purchase." The objections made at the trial to defeat the action were not made until shortly before the trial, although they might have been successfully made, if raised in time. To that state of facts, this court applied the rule of the case of *Ohio & Mississippi Railway Company* v. *McCarthy,* above cited.

If the defendant ever had any valid objections to the tender of "extra choice" instead of "choice" apples, the above cited cases are exact authority that such objection was waived. The language of the Supreme Court is again quoted with approval by Judge Knapp in a decision of the Circuit Court of Appeals of the Fourth Circuit in the case of

Wall Grocery Co. v. *Jobbers' Overall Company,* 264 Fed. 71-74. (Fourth Circuit.)

In that case the defense sought to be made upon the trial was based upon the failure of plaintiff to furnish specifications for certain overalls covered by the contract. In the correspondence, however, the plaintiff did not assign any such reason for refusing performance, but relied solely upon the proposition that it had never "confirmed the order." The Court say: "Plainly, as we think, defendant cannot now shift its claim for the purpose of evading liability," and then quotes the language of the Supreme Court in the McCarthy case.

The same rule is laid down by the District Court of New York in

Robertson v. *Garvan,* 270 Fed. 643-649. (Second Circuit.)

In that case, objection was made at the trial that the

seller breached the contract by failing to ship the ore "in as near as possible equal weekly quantities." At the time of the breach, the objection was based solely on a certain vis major clause in the contract. It was held that it was too late to claim a breach of the contract upon any ground other than the one urged at the time of the breach. As shown by the citations in Judge Ross' opinion above referred to, the rule here contended for is one of general application in both Federal and State Courts, including the Supreme Court of California.

In its argument upon this branch of the case, the plaintiff in error, in its brief, at page 49 says:

> "As long as 'choice' evaporated apples were available in the market the defendant had a *right to insist* upon the delivery of that particular grade." (Italics ours.)

The fault of the argument is that defendant did not so insist but waived any right which it might have had in that regard.

3. The proper construction of the contract sued upon does not imply that the order could be filled with "extra choice" apples only in the event that it was physically impossible for the seller to obtain "choice" apples. The clause, "with provision that seller may be privileged to substitute grades, provided cannot fill order with grade ordered, 'extra choice' 19¢, 'fancy' 19¾¢," was evidently intended by the parties to confer upon the seller the option of furnishing apples of any of the three qualities named at the prices quoted. The contract was so interpreted by the plaintiff. Its president testified: "The contract gave

us the privilege of filling the order with either choice or extra choice or fancy; we elected to fill it with extra choice." (Tr., p. 52.) Defendant's attention was called to the matter of grading by the plaintiff's letter of January 13th. (Plaintiff's Ex. No. 1, Tr., p. 33.) The letter of March 6th also indicates that the plaintiff interpreted the contract as giving it an election. (Defendant's Exhibit "D," Tr., p. 57.) Evidently the contract was interpreted in like manner by the defendant, for in none of the correspondence either before or after the breach is there any suggestion that the tender of "extra choice" apples at 19 cents was not a performance by plaintiff of the terms of the contract. On January 28th, plaintiff advised defendant that the car tendered was "extra choice" apples. Defendant made no objection upon that ground, notwithstanding that these identical apples were warehoused for the defendant, and draft for the contract price at 19 cents, with warehouse receipt attached, forwarded by plaintiff to defendant on March 6th. Again on September 25, 1920, the plaintiff advised the defendant of the sale of this identical car of apples and in its invoice, enclosed with such letter, referred to 1200 boxes "extra choice" evaporated apples. (Tr., pp. 45-46.) Defendant, therefore, had notice from January 28, 1920, to the date of the trial that the apples tendered were "extra choice" and made no objection thereto. To that situation the language of the Supreme Court in the McCarthy case is very pertinent: "This point was an afterthought, suggested by the pressure and exigencies of the case."

It is respectfully submitted that this case was correctly decided by Judge Bourquin in the District Court; that no error appears in the record; and that the judgment should be affirmed.

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